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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of  
Toll Free Service Access Codes

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CC Docket No. 95-155

**FOURTH REPORT AND ORDER AND  
MEMORANDUM OPINION AND ORDER**

Adopted: March 27, 1998

Released: March 31, 1998

By the Commission: Commissioner Harold Furchtgott-Roth dissenting in part and issuing a statement.

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## I. INTRODUCTION

1. In this Fourth Report and Order, we address the assignment of toll free vanity numbers. A toll free vanity number is a telephone number for which the letters associated with the number's digits on a telephone handset spell a name or word of value to the number holder.<sup>1</sup> For purposes of this Order, vanity numbers also include any numbers in which the holders have a particular interest, economic, commercial, or otherwise.<sup>2</sup> Vanity numbers often spell words or names identifying certain products and services. These numbers are often of value to their subscribers because they can generate high visibility and consumer recognition when used in advertising. Since the 800 toll free code was introduced in 1967, toll free numbers have proven to be a very popular business tool.<sup>3</sup>

2. When 800 toll free numbers became available, vanity numbers in that code were made available on a first-come, first-served basis.<sup>4</sup> Given the popularity of the 800 toll free code, by 1995, few numbers in the 800 toll free code remained unassigned. The industry selected "888" as the next toll free code and planned to deploy 877 and 866, as subsequent toll free codes.<sup>5</sup> In the spring of 1995, the industry informed the Commission that the accelerated pace of reservation and use of 800 numbers was depleting the supply of unassigned 800 numbers. The industry stated that, without Commission intervention, all 800 numbers would be assigned before the next toll free code, 888, could be introduced, or "opened." As the deployment of the 888 toll free code approached, holders of 800 vanity numbers expressed an interest in obtaining the corresponding vanity number in the 888 toll free code. Rather than delay the deployment of the 888 code, the Common Carrier Bureau ordered that those numbers in the 888 code in which 800 subscribers expressed an interest be set aside in an "unavailable pool" of numbers as an interim measure until the Commission

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<sup>1</sup> See Toll Free Service Access Codes, *Notice of Proposed Rulemaking*, CC Docket No. 95-155, FCC No. 95-419 (rel. Oct. 5 1995) ("Notice") at para. 35.

<sup>2</sup> *Id.*

<sup>3</sup> See Toll Free Service Access Codes, *Second Report and Order*, 62 Fed. Reg. 20,147, FCC 97-123 (rel. April 11, 1997) ("Second Report and Order") at para. 4. A toll free telephone call differs from a traditional telephone call in that the called party ("toll free subscriber") pays for the completed call. Additionally, unlike the traditional telephone number, the toll free number assigned to a toll free service subscriber does not depend on that subscriber's geographic location. These characteristics proved so valuable to businesses that the service flourished domestically and internationally. *Id.*

<sup>4</sup> To obtain a toll free number, a subscriber must choose an entity, known as a Responsible Organization ("RespOrg"), to be responsible for managing that subscriber's record in the database of toll free numbers. RespOrgs reserve toll free numbers for their customers. A RespOrg can be an interexchange carrier ("IXC"), a local exchange carrier ("LEC"), a wireless carrier, or a large organization such as Westinghouse.

<sup>5</sup> The industry has also set aside the following additional codes for future use in toll free service: 855; 844; 833; and 822.

resolved how they should be assigned.<sup>6</sup> In 1996, the new toll free code, 888, was opened. In September, 1998, the industry informed the Commission that the accelerated pace of reservation of 888 numbers was depleting the supply of unassigned 888 numbers. Another toll free code, 877, will become available in April 5, 1998, and additional toll free codes will be made available thereafter, as demand warrants.

3. In this Fourth Report and Order, we conclude that vanity numbers in the 877 toll free code and future toll free codes shall be assigned on a first-come, first-served basis as each code is opened for calling. We also conclude that the vanity numbers in the 888 code shall be assigned pursuant to a right of first refusal. If, however, the current 800 subscriber with the number corresponding to the 888 set-aside vanity number declines to reserve that 888 set-aside number, the number shall be assigned on a first-come, first-served basis. The 888 set-aside numbers will be available for assignment 90 days after the 877 code is deployed.

4. In this Fourth Report and Order, we also address the Application for Review filed by American Telegram Corporation ("ATC") requesting that the Commission review and reverse the Common Carrier Bureau's decision to deny ATC's request to require MCI Telecommunications Corporation ("MCI") to return two specific 888 numbers to unavailable status pending the Commission's determination of whether 800 subscribers wishing to obtain the corresponding numbers in the 888 code will be afforded any special protection or right to do so.<sup>7</sup> We deny ATC's application requesting Commission review and reversal of the Bureau's decision.

## II. BACKGROUND

5. The Commission, in October 1995, initiated this rulemaking to ensure that toll free numbers would be allocated among domestic users on a fair, equitable, and orderly basis.<sup>8</sup> The Notice sought comment on proposals to: (1) promote the efficient use of toll free numbers; (2) foster the fair and equitable reservation and distribution of toll free numbers; (3) smooth the transition period preceding the introduction of a new toll free code; (4) guard against warehousing, hoarding, and brokering of toll free numbers; and (5) determine how toll free vanity numbers should be treated.<sup>9</sup>

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<sup>6</sup> See discussion in paragraph 35.

<sup>7</sup> Letter from Roger J. Meyers, ATC, to William F. Caton, FCC (February 13, 1997).

<sup>8</sup> See Notice.

<sup>9</sup> *Id.* at para. 2.

6. The Communications Act of 1934,<sup>10</sup> as amended by the Telecommunications Act of 1996,<sup>11</sup> gives the Commission exclusive jurisdiction over "those portions of the North American Numbering Plan that pertain to the United States."<sup>12</sup> In the Second Report and Order in this docket, the Commission concluded that section 1 of Title I of the Act and section 251(e)(1) of Title II of the Act require us to "ensure the efficient, fair, and orderly allocation of toll free numbers."<sup>13</sup> The Commission also determined that it would not alter its prior holdings regarding ownership issues.<sup>14</sup> Additionally, the Commission declined to adopt partitioning of toll free service codes after finding that this option would not serve the public interest.<sup>15</sup> The Commission also declined to adopt any special measures to exempt 888 subscribers from charges for misdialed calls to new 888 numbers that correspond to a high-volume number in the 800 code.<sup>16</sup> Further, the Commission declined to adopt a transitional gateway intercept requirement.<sup>17</sup> The Commission adopted rules prohibiting warehousing, hoarding, and brokering of toll free numbers.<sup>18</sup> These measures were adopted in an effort to conserve the toll free numbering resource. One of the issues left unresolved in the Second Report and Order was how toll free vanity numbers should be distributed. The Commission

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<sup>10</sup> 47 U.S.C. §§ 151 *et seq.* ("the Act").

<sup>11</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

<sup>12</sup> 47 U.S.C. §§ 1 and 251(e)(1).

<sup>13</sup> Second Report and Order at para. 18.

<sup>14</sup> *Id.* at para. 32. The Commission had previously characterized telephone numbers as a public resource and concluded that neither carriers nor subscribers could "own" their telephone numbers. Notice at para. 36 (*citing* In the Matter of Administration of the North American Numbering Plan, *Report and Order*, CC Docket No. 92-237, 11 FCC Rcd 2588 (1995) ("NANP Order")).

<sup>15</sup> Second Report and Order at para. 67. A partitioning requirement would leave the 800 toll free code for use by commercial entities and assign a new toll free code to subscribers for personal and paging use.

<sup>16</sup> *Id.* at para. 72. For example, a telemarketing firm may receive thousands of calls per day through one toll free number. The Commission acknowledged that, soon after the introduction of a new toll free code, there is a strong likelihood that a subscriber with a number in one toll free code corresponding to a high-volume number in another toll free code might receive many misdialed calls. *Id.*

<sup>17</sup> Second Report and Order at para. 75. A transitional gateway intercept is a pre-recorded intercept message prompting the caller to select the correct number. The message would have played for an unspecified period after a new code opened whenever a caller dialed a toll free number in the new code with its last seven digits corresponding to those of a number in another toll free code.

<sup>18</sup> Second Report and Order at paras. 22 & 29. Warehousing occurs when a RespOrg obtains toll free numbers from the toll free database without having an identified subscriber for those reserved numbers. Hoarding occurs when a toll free subscriber acquires more numbers from a RespOrg than it intends to use for the provision of toll free service. Brokering of toll free numbers is the sale of a toll free number by a private entity for a fee.

sought comment on how 888 vanity numbers should be assigned once they were released and how vanity numbers in subsequent toll free codes should be treated.<sup>19</sup> The alternatives on which the Commission sought comment included assigning vanity numbers through a first-come, first-served reservation process, a right of first refusal, Standard industrial classification ("SIC") codes,<sup>20</sup> a lottery, or a competitive bidding process.

7. Assigning vanity numbers on a first-come, first-served basis means that vanity numbers would be afforded no special treatment and would be released as any other number in a particular toll free code. A right of first refusal, however, would mean that, unless a toll free subscriber was first offered, and declined, the corresponding number in a subsequent code, that number would not be assigned to any other customer. The Commission sought comment on whether we should extend a right of first refusal to holders of toll free vanity numbers whenever another toll free code opened.<sup>21</sup> The Commission asked commenters, if we permitted subscribers to exercise a right of first refusal, whether those subscribers should be required to pay a fee for exercising that right, what entity should receive the money, and how the money should be used.<sup>22</sup> Additionally, the Commission questioned the possible

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<sup>19</sup> *Id.* at paras. 41-46.

<sup>20</sup> *Id.* at paras. 44-45. The SIC code system assigns a seven-digit number to each product and service produced by every establishment in the economy. The system divides the economy into 11 divisions. The first two digits of the SIC code classifies economic activities by major group. The third through seventh digits provide successively finer establishment classification. For example, the four-digit classification for scheduled air transportation, which is a subcategory of the major group 45 (transportation by air), is 4512. Other products, and their four-digit SIC codes, in major group 45 include the following: air transportation, nonscheduled (4522); and airports, flying fields, and airport terminal services (4581). *Standard Industrial Classification Manual*, 1987, Executive Office of the President, Office of Management and Budget ("OMB") 277, 277-78 (1987) ("The SIC Manual").

A current holder of an 800 number, for example, concerned that the corresponding 888 number would be assigned to a business rival, would report its SIC code to its 800 service provider or RespOrg, which in turn would report the code to Database Services Management, Inc. ("DSMI"), which administers the database of toll free numbers. DSMI would then incorporate this code into the subscriber's record and would query the database when applicants request an 888 number to determine if their code matches that of the current holder of the corresponding 800 number. If the applicant for the 888 number and the current holder of the corresponding 800 number share the same SIC code, the applicant for the 888 number would not be permitted to obtain the corresponding 888 number. Commenters were asked to comment on this proposal, to identify the number of digits of the SIC code that should be used to make this an effective remedy against fraud or "free riding" on the good will of a competitor, and to explain how conglomerates should be treated.

<sup>21</sup> *Id.* at para. 42.

<sup>22</sup> *Id.* at para. 41

international implications of creating such a right for domestic subscribers,<sup>23</sup> the Commission's statutory authority to promulgate these measures,<sup>24</sup> and the effect this option would have on the Commission's goal "to ensure the efficient, fair, and orderly allocation of toll free numbers."<sup>25</sup> Lastly, the Commission asked whether, in the event that we deny a right of first refusal, trademark law provides sufficient protection to current holders of 800 numbers.<sup>26</sup>

8. In the Notice, the Commission also sought comment on the possibility of limiting the assignment of equivalent numbers in different toll free codes to competitors who share the same SIC code. The Commission also sought comment on the possibility of distributing vanity numbers through a lottery or a competitive bidding process.<sup>27</sup>

9. In the Notice, the Commission proposed to identify 888 equivalent vanity numbers, set them aside as "unavailable," and then possibly release them at the end of the 888 assignment pool when the 888 toll free code was exhausted.<sup>28</sup> The Commission reasoned that delaying release of the 888 vanity numbers until the 888 assignment pool was exhausted would give the public adequate time to become familiar with the use of multiple toll free codes.<sup>29</sup> On January 24, 1996, the Commission issued an Order delegating authority to the Chief of the Common Carrier Bureau to resolve the issues raised in the Notice that were essential to opening the 888 toll-free code.<sup>30</sup> In an Order released January 25, 1996, the Bureau directed RespOrgs to poll their 800 commercial subscribers to determine which numbers the subscribers wished to replicate in the 888 toll free code.<sup>31</sup> The Bureau also

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<sup>23</sup> *Id.* at para. 43. The Commission asked commenters to address whether a right of first refusal is consistent with international intellectual property laws. The Commission specifically requested comments on issues relating to any International Telecommunications Union activities concerning "free phone." Toll free service is known internationally as "free phone."

<sup>24</sup> *Id.* at para. 41.

<sup>25</sup> *Id.* at para. 42.

<sup>26</sup> *Id.* at para. 40.

<sup>27</sup> Notice at para. 41.

<sup>28</sup> Notice at para. 46.

<sup>29</sup> See generally Notice at para. 35.

<sup>30</sup> In the Matter of Toll Free Service Access Codes, *Order*, 11 FCC Rcd 3045 (1996).

<sup>31</sup> In the Matter of Toll Free Service Access Codes, *Report and Order*, 11 FCC Rcd 2496 (1996) ("First Report and Order").

directed the database administrator,<sup>32</sup> Database Service Management, Inc. ("DSMI"), to place these identified replicated 888 vanity numbers in "unavailable status" until the Commission resolved how these numbers should be allocated.<sup>33</sup> Additionally, the Bureau concluded that the remaining 888 numbers should be available on a first-come, first-served basis.<sup>34</sup> On March 1, 1996, the 888 toll free code was deployed. As of February 8, 1996, 374,199 numbers were marked unavailable within the toll-free database.<sup>35</sup>

10. Because the record on the Notice is almost two years old, and the 877 code is scheduled for opening in April 1998,<sup>36</sup> the Common Carrier Bureau issued a Public Notice on July 2, 1997, requesting comments to refresh the record on issues relating to the treatment of toll free vanity numbers.<sup>37</sup>

### III. DISCUSSION

#### A. Overview

11. Toll free vanity numbers spell words or names identifying certain products and services. These numbers are of value to their subscribers since they can generate high visibility and consumer recognition when used in advertising. Because of these characteristics, many subscribers to 800 toll free numbers have invested and continue to invest substantial resources in advertising these numbers and associating them with the subscribers' particular products and services. As a result, these subscribers have expressed concern over the effects multiple toll free codes will have on their businesses if new subscribers obtain corresponding numbers in different codes. Specifically, 800 subscribers have expressed concern over new subscribers in the same line of business deriving benefit from the advertising and good will associated with their preexisting 800 vanity numbers. In addition, subscribers are concerned over misdialing that may occur if consumers fail to realize that each number in each toll free code is distinct.

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<sup>32</sup> The database system provides a user-friendly environment for RespOrgs to enter data regarding toll free numbers within their control. The system also permits toll free subscribers to change service providers without having to change their toll free numbers.

<sup>33</sup> First Report and Order at para. 2.

<sup>34</sup> *Id.* at para. 22.

<sup>35</sup> Letter from Michael J. Wade, President, DSMI, to Kathleen Levitz, Deputy Chief, Common Carrier Bureau, FCC (Feb. 15, 1996).

<sup>36</sup> The Alliance for Telecommunications Industry Solutions ("ATIS") - sponsored Service Management System ("SMS") Number Administration Committee ("SNAC") is responsible for planning implementation of the 877 toll free code.

<sup>37</sup> 62 Fed. Reg. 36,476 (July 8, 1997). See Appendix D for a summary of parties' comments.

12. The Commission's goal pursuant to Section 251(e)(1) of the Act is to ensure that toll free number allocation is 1) orderly and efficient, and 2) fair.<sup>38</sup> An orderly allocation of toll free numbers will simplify the administrative requirements necessary to assign toll free numbers and avoid the need to resolve competing claims among subscribers to particular numbers. An efficient allocation of toll free numbers will minimize exhaustion of the toll free numbering resource. A fair allocation of toll free numbers will provide all subscribers reasonable opportunity to obtain vanity numbers. This final goal must be furthered in light of the well-established principle that toll free numbers are a public resource and cannot be owned by carriers or subscribers.<sup>39</sup>

13. With respect to toll free codes to be made available henceforth, we have evaluated four options in light of the three stated criteria with a two-part test. We rule out the use of SIC codes, lotteries, and auctions as inappropriate assignment methods for vanity numbers because these options fail to provide an orderly allocation method. In contrast, we find that the use of a first-come, first-served assignment leads to an orderly and efficient allocation of vanity numbers. In addition, we conclude that the use of a first-come, first-served assignment method is a more equitable method of allocating these numbers. Finally, we find that the use of a right of first refusal method to assign vanity numbers is generally a less orderly, efficient and equitable system than a first-come, first-served method. With respect to the 888 vanity numbers that have been set aside, however, we conclude that because of the special circumstances concerning those numbers, a right of first refusal method should be used to assign those numbers.

## B. Order and Efficiency

14. As a threshold matter, we evaluate each of the four options to determine whether they are both orderly and efficient. We conclude that SIC codes, lotteries, and auctions will not lead to an orderly allocation of toll free numbers. We also conclude that a right of first refusal, when used generally for all numbers in the 877 and subsequent toll free codes, is neither orderly nor efficient.

15. SIC Codes. Adopting a SIC-code system would be inconsistent with our goal of ensuring the efficient, fair, and orderly allocation of toll free vanity numbers. A SIC-code system would be administratively burdensome and difficult to apply in part because, as

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<sup>38</sup> Second Report and Order at para. 2.

<sup>39</sup> See NANP Order at 2591 (stating that telephone numbers are a public resource); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, *Memorandum Opinion and Order*, 59 Rad. Reg. 2d 1275, 1284 (1986); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, *Declaratory Ruling*, Report No. CL-379, 2 FCC Rcd 2910, 2912 (1987), *recon.*, 4 FCC Rcd 2369 (1989) (stating that NXX codes are a national resource); see also Radio Common Carrier Service, Appendix B Commission Policy Statement, 59 Rad. Reg. 2d (P&F) 1275, 1284 (1986).

businesses change, merge, and overlap, SIC-code changes would also be required. In addition, a SIC-code system would not assure orderly allocation of numbers because of the potentially heavy enforcement burden that may be required to prevent incumbent or prospective subscribers from misrepresenting or manipulating classifications in an attempt to obtain or protect numbers of value to them. We find that use of SIC codes would not provide a useful method for identifying potential competitors because of the difficulties involved in identifying those subscribers engaged in manipulation of classifications as well as the problems associated with categorizing businesses that do not clearly fit into one category. No commenters proposed viable methods for determining the specific SIC codes to assign to conglomerates that operate in multiple areas of the economy. We agree with commenters that assert that a SIC-code system likely would impose significant enforcement costs on the Commission because it would involve the Commission in numerous disputes between subscribers over the proper classification.<sup>40</sup> For the foregoing reasons, we decline to use a SIC-code system to determine assignments of toll free vanity numbers.

16. Lottery or Auction. Although a lottery or an auction would offer all participants an equal opportunity to obtain a particular vanity number, we are concerned that lotteries could encourage brokering and manipulation of the system to bypass eligibility requirements, as some commenters suggest.<sup>41</sup> For example, in a lottery situation, a prospective subscriber might commission multiple RespOrgs or other subscribers to seek the number in order to increase its chances of winning the number. Additionally, lotteries and auctions are more difficult to administer than a first-come, first-served reservation process because they require greater oversight and would likely result in delay in the issuance of numbers. Finally, in the international context, it is unclear what entity would receive the proceeds from an auction. The North American Numbering Plan is used by eighteen countries, including the United States, Canada, and several Caribbean countries.<sup>42</sup> Because the Commission has no authority over subscribers in other countries, it would be unable to dictate what entity should receive auction proceeds when toll free subscribers in other countries are involved. Although auctions are generally efficient, we cannot say on the present record that auctions of vanity numbers would produce efficiencies that would outweigh the practical difficulties that we have just detailed. Therefore, at this time, we find that lotteries or auctions are not likely to lead to an orderly or efficient allocation of toll free vanity numbers.

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<sup>40</sup> See United States Telephone Association ("USTA") Comments at 3; 1-800-Flowers Comments at 12; LDDS Worldcom Comments at 15.

<sup>41</sup> See Direct Marketing Association ("DMA") Supplemental Comments at 4; Sprint Comments at 4; U S West Communication, Inc. ("U S West") Further Comments at 5.

<sup>42</sup> The NANP is the basic numbering scheme for the telecommunications networks located in Anguilla, Antigua, Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent, Turks & Caicos Islands, and Trinidad & Tobago.

difficulties that we have just detailed. Therefore, at this time, we find that lotteries or auctions are not likely to lead to an orderly or efficient allocation of toll free vanity numbers.

17. Right of First Refusal. We find that granting a right of first refusal for all vanity numbers in the 877 and subsequent toll free codes is inefficient because it would lead to more rapid exhaustion of toll free numbers, which are a limited and valuable public resource. If offered a right of first refusal, some subscribers may elect to reserve corresponding numbers in new codes and then minimally use those numbers solely to prevent competitors from obtaining those numbers. Moreover, the likelihood of more rapid depletion would increase as additional toll free codes are made available because it is likely that a growing percentage of numbers in each code would be taken by subscribers exercising their right of first refusal. A subscriber interested in protecting a number in one toll free code would likely be interested in protecting that number in every toll free code. In addition, as more codes open, the chances increase that some subscriber will have found a vanity number use for a new set of numbers. Thus, a higher percentage of numbers in each new code could be subject to at least one subscriber's right of first refusal.

18. Many commenters offer creative variations on a right of first refusal that might curb the ratio of numbers in new codes that will be reserved by existing subscribers. We find, however, that these proposals fail to maximize the efficient allocation and use of toll free numbers. Regardless of the limitations imposed on incumbent subscribers, any system involving a right of first refusal inherently means that certain numbers will be unavailable to other toll free subscribers.

19. Furthermore, a right of first refusal is a less orderly method for assignment of vanity numbers than a first-come, first-served method. As multiple codes open, there could be multiple subscribers with a right of first refusal for each number in different codes.<sup>43</sup> It would be an administrative burden to devise a method for determining which subscriber should be given priority to seek the corresponding number. In addition, any such method inevitably would lead to disputes between subscribers. This system of number allocation also would involve additional administrative costs since, prior to the opening of each new code, it would be necessary to conduct a poll of existing toll free customers to identify the vanity numbers in that code.

20. Moreover, granting a right of first refusal conflicts with the well-established principle that telephone numbers are a public resource that subscribers do not own.<sup>44</sup> Telephone numbers are essential to routing calls over the public switched network. The 1996

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<sup>43</sup> For example, with 822, there could be seven subscribers with a right of priority refusal if none of the subscribers to equivalent numbers in earlier codes had exercised his refusal rights. The codes that would have opened earlier are 800, 888, 877, 866, 855, 844, and 833. Some method would have to have been established to determine the order in which these subscribers could exercise the right of refusal.

<sup>44</sup> See *supra* note 14.

numbers.<sup>45</sup> We again affirm our prior holding that carriers and subscribers do not own numbers<sup>46</sup> and we find that number portability does not imply ownership of numbers. Maintaining the right to use a particular existing number when changing carriers is different than having an ownership interest in a number. Upon discontinuing service, a subscriber has no right to retain its number. Rather, the number is returned to the pool of available numbers.

21. We recognize that the problems associated with the use of a right of first refusal process arise primarily in the use of this method to assign toll free numbers on an ongoing basis as future codes are opened to subscribers. We find that these efficiency problems would not arise if a right of first refusal method were used to assign toll free vanity numbers in the 888 code. Only 374,199 numbers were originally set aside out of approximately 8 million numbers available in the 888 code. If the option were limited to 888, the right would go to the holder of the 800 number that requested that the 888 number be set aside. Therefore, there would be no disputes among 800 subscribers concerning their rights to reserve these particular 888 numbers. Consequently, a right of first refusal limited to the 888 vanity numbers would not raise the concern regarding more rapid exhaustion of numbers or how to address competing requests among holders of the same numbers in different toll free codes. We conclude, therefore, that the use of a right of first refusal to assign vanity numbers in the 888 toll free code would produce an efficient and orderly allocation of those numbers.

22. First-Come, First-Served Assignment. A first-come, first-served reservation process will ensure an orderly allocation of toll free vanity numbers. Since only one subscriber would be eligible to reserve a particular number, this system would avoid the need to resolve competing claims among subscribers to assignment of particular numbers. Although we recognize commenters' concerns regarding trademark infringement and unfair competition, we find that those issues properly should be addressed by the courts under the trademark protection and unfair competition laws,<sup>47</sup> rather than by the Commission.

23. We find that a first-come, first-served process, with one exception discussed below, is the most efficient and least expensive way of assigning toll free numbers among the alternatives addressed in the record.<sup>48</sup> Indeed, it is noteworthy that the industry has used a first-come, first-served process for reserving non-vanity toll free numbers and experience to

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<sup>45</sup> 47 U.S.C. § 251(e)(1) ("[t]he Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis").

<sup>46</sup> Second Report and Order at para. 32. Cf. National Association of Telecommunications End-Users ("NATE") Further Comments and Reply at 1 (Further Comments and Reply filed late).

<sup>47</sup> See 15 U.S.C. §§ 1051 *et. seq.* (the Lanham Act).

<sup>48</sup> First Report and Order at para. 22.

date has shown that, in general, a first-come, first-served policy is efficient.<sup>49</sup> Use of a first-come, first-served assignment avoids the problems of accelerated number depletion and subscriber disputes about reservation priority as discussed above with respect to the use of a right of first refusal method. We recognize that, under a first-come, first-served reservation process, some subscribers may instruct their RespOrgs to reserve equivalent numbers as soon as a new code opens. Even if this were to occur, however, a first-come, first-served reservation process does not provide any inherent advantage to incumbent subscribers, as the right of first refusal does. Moreover, a subscriber whose RespOrg is unsuccessful in reserving the equivalent number in a new code would not have an incentive to reserve another number in the new toll free code in its place if the subscriber sought to reserve the equivalent number solely for the purpose of preventing competitors from obtaining it. Thus, the rate of number depletion is likely to be slower if there is no automatic right of first refusal. In addition, we believe that the incentives of subscribers to engage in this strategy of attempting to reserve equivalent numbers in new toll free codes as they are opened will diminish over time. As users of toll free numbers recognize that each toll free number in a code is distinct from similar numbers in other codes, there will be less of a need to obtain the corresponding numbers in subsequent toll free codes. In other words, concerns over consumer confusion, misdialing, and dilution of investments should decrease because consumers will not assume that toll free subscribers have the same number in other codes.

### C. Fairness

24. Having determined that a first-come, first-served assignment method and a right of first refusal (in limited circumstances) meet the threshold requirements of order and efficiency, we must determine whether one system is fairer.

25. First-Come, First-Served Assignment. A first-come, first-served assignment method, as applied to vanity numbers in general, best serves our goal to assign toll free numbers fairly because it does not discriminate against new subscribers. All subscribers would be given an equal opportunity to reserve desirable toll free numbers as new codes are opened. This method is especially appropriate given that one telephone number could have a variety of vanity applications.

26. Right of First Refusal. A right of first refusal assignment method for toll free vanity numbers would discriminate against new subscribers by denying them the opportunity to obtain certain desirable numbers to promote their businesses. A toll free number may have commercial value because, for example, it is easy to remember, or because it corresponds to many different words related to different lines of business. A right of first refusal would prevent prospective toll free subscribers from using certain numbers even when that use might not affect subscribers that use equivalent numbers in other codes. For example, the new

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<sup>49</sup> See First Report and Order at para. 22; cf. *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1469-70 (D.C. Cir. 1984) (The Commission authorized the leasing of transponders on a first-come, first-served basis).

subscriber might use the last seven digits to spell words that are different from the words subscribers in other codes associate with those digits.<sup>50</sup>

27. 800 Users Coalition ("Coalition") relies on *Holiday Inns v. 800 Reservation*<sup>51</sup> to argue that declining to adopt a right of first refusal would be unfair to incumbent toll free subscribers. We find Coalition's reliance on *Holiday Inns* misplaced. The issue in *Holiday Inns* was whether the holder of a trademarked vanity number may claim trademark rights in complementary,<sup>52</sup> not corresponding, numbers.<sup>53</sup> The *Holiday Inns* Court simply noted, in *dicta*, that, if *Holiday Inns* was concerned about unfair competition, it should have taken the simple precaution of reserving its complementary number.<sup>54</sup> Coalition argues that the only practical way to engage in this type of self help is through a right of first refusal.<sup>55</sup> Contrary to Coalition's argument that the *Holiday Inns* holding requires the Commission to create a right of first refusal, a more reasonable reading of *Holiday Inns* is that, if the Commission did create such a right, a trademark holder would be required to exercise that right as a reasonable self-help measure. Furthermore, we are not precluding subscribers from reserving numbers of their choice; rather, we permit all subscribers to engage in that process on a first-come, first-served basis. We recognize that many commenters may have invested in their numbers by, for example, advertising and developing name recognition, and that a right of first refusal would arguably protect that investment. We disagree, however, that a right of first refusal is the only way subscribers can protect these investments. Some toll free subscribers may have recourse to the trademark protection laws. Public education campaigns, too, can minimize confusion and thus protect subscribers' investments. Although, as Coalition notes, misdialing may occur, we are confident that as new toll free codes are opened, consumers will become more accustomed to an environment with multiple toll free codes, and will recognize that the same seven digits in different toll free codes in all likelihood are used by different toll free subscribers.<sup>56</sup>

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<sup>50</sup> For example, a company selling SCUBA equipment might advertise its toll free number 800-123-3337 as 800-123-DEEP and the Federal Bureau of Investigation might advertise its toll free number 888-123-3337 as 888-123-FEDS.

<sup>51</sup> *Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619 (6th Cir. 1996) ("*Holiday Inns*").

<sup>52</sup> Complementary numbers are those numbers that are frequently misdialed when a customer dials a vanity number. For example, 1-800-H[0]L[1]DAY is a complementary number to "1-800-HOLIDAY" because customers frequently substitute the number zero for the letter "O" and the number one for the letter "I."

<sup>53</sup> *Holiday Inns*, 86 F.3d at 625.

<sup>54</sup> *Id.*

<sup>55</sup> Coalition Supplemental Comments at 13.

<sup>56</sup> This will be true as well for those public service numbers over which General Services Administration ("GSA") expresses concern. GSA Comments at 2-3.

28. Many commenters raised proposals limiting a right of first refusal.<sup>57</sup> These proposals fail to overcome other problems associated with a right of first refusal, such as the discriminatory impact a right of first refusal would have on new subscribers. While imposing limitations on a right of first refusal might lead to greater availability of toll free numbers for new subscribers, those subscribers would still be second in line to the incumbent subscribers.

29. 888 Set-Aside Vanity Numbers. We find that a right of first refusal is more equitable than a first-come, first-served method in one limited circumstance: assigning the 888 set-aside vanity numbers. The 888 toll free code was the first successor to the 800 code, which was in use for almost 30 years before numbers in that code were exhausted.<sup>58</sup> As a result, we believe that the arguments advanced by the proponents of the right-of-first-refusal assignment system are most compelling as applied to the allocation of 888 vanity numbers. Although 888 numbers are now in widespread use (and, indeed, approaching exhaustion), we are concerned that consumers are still adjusting to this environment of having more than one toll free code in use. We agree with commenters who contend that the problems of customer confusion, misdialing, and new toll free subscribers benefiting from the marketing efforts of 800 subscribers with the same seven-digit numbers are likely to be most serious in the case of the first toll free number opened after the 800 code.<sup>59</sup> As subsequent toll free codes are introduced, customers will become more cognizant that there are numerous toll free codes thus, reducing instances of confusion and misdialing. In addition, providing a right of first refusal solely with respect to numbers that have been set aside in the 888 code does not entail the inefficiencies or administrative burdens that would result if we were to do likewise for all subsequently established toll free codes. Although it would be reasonable for us to require the use of a first-come, first-served method for all new toll free numbers, on balance we believe that it would be preferable to permit the 800 subscribers that have designated particular 888 numbers to be set aside to have a right of first refusal to use those numbers. This procedure for assignment of the 888 set-aside vanity numbers would be performed pursuant to our obligation under section 251(e)(1) of the 1996 Act,<sup>60</sup> to allocate numbers on an equitable basis, and does not imply that these subscribers possess ownership interest in these 888 numbers.

30. For the foregoing reasons, we create a limited exception to the first-come, first-served policy and permit a right of first refusal for the 888 set-aside numbers only. As

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<sup>57</sup> See, e.g., Invesco Funds Group, Inc. ("IFG") Comments at 1-2 (recommending requiring a subscriber to establish a need for the second number before exercising its right of first refusal); Network Telephone Service, Inc. ("NTS") Comments at 2 (supporting a right of first refusal provided that each RespOrg is granted the same percentage of their current base in conjunction with a circuit breaker built into the database system, which would prevent the RespOrg from reserving a vanity number once it reaches its cap).

<sup>58</sup> The 800 toll free code was introduced in 1967.

<sup>59</sup> Bell Atlantic Telephone Companies ("Bell Atlantic") Comments at 8.

<sup>60</sup> 47 U.S.C. 251(e)(1).

multiple toll free codes open, subscribers must invest in and advertise their numbers with the knowledge that there are existing toll free codes and, therefore, that they will not be given a right of first refusal for codes beyond 888. Furthermore, we emphasize that our rules prohibit hoarding and warehousing.<sup>61</sup> Under these rules, an 800 subscriber that reserved an 888 number for the sole purpose of preventing a competitor from obtaining that number and did not activate that number for use would be considered to be hoarding in violation of the Commission's rules. Therefore, an 800 subscriber that exercises the right of first refusal for an 888 set-aside number must use that number by activating service through a toll free service provider within the time periods provided by the Commission's rules.<sup>62</sup>

31. Fee-Based Right of First Refusal. We decline to adopt a fee-based right of first refusal for any toll free number. A fee-based right of first refusal would require a subscriber to pay a fee for the right to obtain a corresponding number in a subsequent toll free code. After considering arguments made by commenters in support of this option, we conclude that a fee-based right of first refusal would not overcome any disadvantages associated with a right of first refusal. First, with respect to the 888 set aside numbers, a fee-based right of first refusal would be impractical and administratively difficult to justify. The cost and administrative effort required to implement and administer a one-time fee plan for this finite set of numbers would outweigh any benefits a fee may provide. Second, a fee-based right of first refusal could unfairly prejudice small businesses, unable to compete against the greater resources of large businesses. Finally, if the fee is proposed for the purpose of deterring subscribers from hoarding numbers, our anti-hoarding rules already in place will serve that purpose.

32. We conclude that current 800 subscribers holding 800 vanity numbers that correspond to previously set-aside 888 vanity numbers shall have a right of first refusal to the corresponding 888 number. If the 800 subscriber refrains from exercising its option to reserve the corresponding 888 number, the set-aside 888 vanity number shall be released into the available pool of toll free numbers, and distributed on a first-come, first-served basis. Right of first refusal procedures must take place within 90 days of 877 deployment. The 888 set-aside numbers will then be available for assignment 90 days after the 877 code is deployed. We find a right of first refusal appropriate only for the 888 set-aside vanity numbers and not for vanity numbers in subsequent toll free codes.

33. In order to ensure an orderly and efficient implementation of the right of first refusal for the 888 set-aside vanity numbers and implementation of 877, we delegate to the Chief, Common Carrier Bureau, authority to resolve the implementation details for assignment and deployment of these numbers. We also delegate to the Bureau Chief authority to implement conservation plans on any or all toll free codes in use if needed to prevent exhaust of toll free numbers.

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<sup>61</sup> 47 C.F.R. §§ 52.105 and 52.107.

<sup>62</sup> See 47 C.F.R. § 52.103.

#### IV. MEMORANDUM OPINION AND ORDER

34. On February 13, 1997, American Telegram Corporation ("ATC") filed an application for review and reversal of the Common Carrier Bureau's decision to deny ATC's request to require MCI Telecommunications Corporation ("MCI") to return two specific 888 numbers to unavailable status pending the Commission's determination of whether 800 subscribers wishing to obtain the corresponding numbers in the 888 code will be afforded any special protection or right to do so. On December 9, 1997, ATC filed a supplement to its original application for review.<sup>63</sup>

35. The 888 code was opened March 1, 1996. Several weeks prior to that, on January 25, 1996, the Bureau directed DSMI to place in unavailable status those numbers in the 888 code that subscribers to the corresponding numbers in the 800 code stated they wished to set aside for their use.<sup>64</sup> The Bureau deferred to the RespOrgs to identify what 888 numbers, designated through their polling processes, were to be set aside.<sup>65</sup> The identified numbers were to remain in unavailable status until the Commission decided whether such numbers should be afforded permanent special protection.<sup>66</sup> Subsequently, some subscribers notified the Bureau that DSMI or their RespOrgs had omitted from the list of protected numbers certain 888 numbers that subscribers wished to place in unavailable status. On February 29, 1996, the Bureau directed DSMI to reclassify as unavailable those 888 numbers identified by 800 subscribers that were erroneously omitted from the list of unavailable numbers, provided that those numbers were not already in "working" status.<sup>67</sup> These requests had to be submitted in writing by either the 800 subscriber, or the subscriber's RespOrg, and had to be received by DSMI by 11:59 p.m. March 15, 1996. It subsequently came to the Bureau's attention that certain 888 numbers that were in "working" status were placed erroneously in "unavailable" status. On March 29, 1996, the Bureau's Network Services Division ("Division") instructed DSMI to reinstate to the original RespOrg any 888 number that was listed in working status prior to 3:00 a.m. March 1, 1996.

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<sup>63</sup> Letter from Roger J. Meyers, ATC, to William F. Caton, FCC (February 13, 1997).

<sup>64</sup> See First Report and Order at para. 2.

<sup>65</sup> *Id.* at para. 13.

<sup>66</sup> *Id.* at para. 2.

<sup>67</sup> A number being classified as in "working" status means that necessary steps have been taken to activate the number and that the number has been identified by descriptive markers in the database. Classifying a number in "working" status does not mean that the number is accepting calls being delivered through the telephone network. Numbers can be listed in the database in "working" status without actually being operational. For the number to be activated on March 1, 1996, information pertinent to that number had to be downloaded to the service control points (the regional local exchange carrier databases used in the processing of toll free calls) before March 1, 1996, and the number had to be listed in "working" status in the toll free database.

36. ATC asserts that, on August 7, 1995, it directed its carrier, LDDS Worldcom, to pre-reserve 39 888 numbers.<sup>68</sup> Only two of those 39 numbers are at issue here. ATC subsequently switched to Sprint Corporation ("Sprint") for toll free service, and also directed Sprint to request that these two 888 numbers be placed in unavailable status. According to ATC, it discovered in late February 1996, that the two 888 numbers had not been placed in unavailable status. At ATC's request, on February 29, 1996, Sprint requested DSMI to place these two numbers in unavailable status. Because these numbers were in working status, however, DSMI was unable to place them in unavailable status. On February 29, 1996 and June 6, 1996, ATC filed requests with the Commission<sup>69</sup> and the Division<sup>70</sup> respectively, requesting that the two numbers in question be placed in the unavailable pool. On April 23, 1996, ATC learned that the numbers had been transferred to MCI, pursuant to the Division's March 29 letter directing DSMI to reinstate to the original RespOrg, in this case MCI, any number that was listed as in "working status" before 3:00 a.m. on March 1, 1996. MCI subsequently activated those numbers.

37. On October 22, 1996, Geraldine A. Matisse, Chief, Network Services Division, Common Carrier Bureau, denied ATC's request because the Division determined that DSMI had acted properly in returning the numbers to MCI.<sup>71</sup> On November 21, 1996, ATC filed a letter requesting that the Bureau reconsider and reverse that decision, and order that the two 888 numbers be reassigned to ATC's RespOrg.<sup>72</sup> On January 14, 1997, Regina M. Keeney, Chief, Common Carrier Bureau, denied ATC's request finding that taking the 888 numbers back from the current subscribers would be unfair because those subscribers were not responsible for the alleged failure of ATC's RespOrg to place the selected numbers in unavailable status at the proper time.<sup>73</sup> On February 13, 1997, ATC filed with the Commission an application for review and reversal of the Bureau's decision.<sup>74</sup> On December

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<sup>68</sup> See Letter from Glenn S. Richards, ATC to William F. Caton, FCC (February 29, 1996) (attaching letter from Roger J. Meyers, ATC to Sonja Coburn, LDDS Worldcom requesting pre-reservation of 39 888 numbers (August 7, 1995)).

<sup>69</sup> Letter from Roger J. Meyers, ATC to William F. Caton, FCC (February 29, 1996).

<sup>70</sup> Letter from Roger J. Meyers, ATC to Geraldine A. Matisse, FCC (June 6, 1996).

<sup>71</sup> Letter from Geraldine A. Matisse, FCC, to Roger J. Meyers, ATC (October 22, 1996).

<sup>72</sup> Letter from Roger J. Meyers, ATC to Regina M. Keeney, FCC (November 21, 1996).

<sup>73</sup> Letter from Regina M. Keeney, FCC, to Roger J. Meyers, ATC (January 14, 1997).

<sup>74</sup> Letter from Roger J. Meyers, ATC to William F. Caton, FCC (February 13, 1997). On March 3, 1997, Network Services Division informed ATC that the Commission would address its request in the context of this rulemaking proceeding. Letter from Geraldine A. Matisse, FCC, to Roger J. Meyers, ATC (March 3, 1997).

8, 1997, ATC filed a supplement to its application for review and reversal of the Bureau's decision.<sup>75</sup>

38. We deny ATC's application for review. First, we note that, in the First Report and Order, it was not the Bureau's intent to resolve claims that a subscriber's set-aside request was not honored, which is why the Bureau deferred to the RespOrg's polling processes to identify what 888 numbers were to be set aside.<sup>76</sup> ATC's RespOrg apparently did not request that those numbers be set aside. Second, the grounds advanced by ATC in support of its application restate the arguments presented to the Bureau. We reviewed the arguments presented and agree with the Bureau's decision that it would be unfair to the current 888 subscribers to take the 888 numbers away from them because of ATC's RespOrg's alleged failure to act on ATC's behalf.

## V. CONCLUSION

39. We conclude that vanity numbers in the 877 toll free code, and in toll free codes beyond 877, shall be released and made available on a first-come, first-served basis as each toll free code is deployed. We further conclude that a right of first refusal shall be offered to current 800 subscribers holding 800 vanity numbers that correspond to the 888 vanity numbers that were initially set aside. If the 800 subscriber refrains from exercising its option to reserve the corresponding 888 vanity number, that number shall be released and made available on a first-come, first-served basis. The 888 set-aside numbers will be available for assignment 90 days after the 877 code is deployed.

40. This Fourth Report and Order will become effective upon publication in the Federal Register. We find good cause exists to have the rules adopted in this Fourth Report and Order take effect upon publication in the Federal Register pursuant to section 553(d)(3) of the Administrative Procedure Act, 5 U.S.C. Section 553(d)(3). The rules adopted herein are critical to ensuring the smooth transition to the new 877 toll free code. We are nearing exhaust of toll free numbers based on industry projection.<sup>77</sup> As a result, there has been a massive industry effort to make the next code ready before complete exhaustion of existing toll free numbers. The 877 toll free code is scheduled for deployment on April 5, 1998. In the interest of a smooth transition to 877, it is prudent to avoid exhaustion of existing codes before the new code is opened. Because the industry must have the guidance of these rules before the next code can be deployed, the rules adopted herein must be in effect prior to April

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<sup>75</sup> Letter from Roger J. Meyers, ATC, to William F. Caton, FCC (December 5, 1997).

<sup>76</sup> First Report and Order at para. 13.

<sup>77</sup> See Letter from Don Werner, ATIS, to Kathie Levitz, FCC, dated September 10, 1997.

5, 1998.<sup>78</sup> Thus, we find that good cause exists to make the rules adopted herein effective upon their publication in the Federal Register.

## VI. PROCEDURAL MATTERS

41. The Final Regulatory Flexibility Analysis is contained in Appendix B.

## VII. ORDERING CLAUSES

42. Accordingly, pursuant to sections 1, 4(i), 201-205, 218, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 218, and 251, IT IS ORDERED that the Fourth Report and Order IS HEREBY ADOPTED.

43. IT IS FURTHER ORDERED that this Fourth Report and Order SHALL BECOME EFFECTIVE upon publication in the Federal Register. For the reasons discussed above, pursuant to section 553(d)(3) of Administrative Procedure Act, 5 U.S.C. § 553(d)(3), we find that good cause exists to have the rule adopted in this Fourth Report and Order take effect immediately upon publication in the Federal Register.

44. IT IS ORDERED, pursuant to Section 5(c)(1) of the Communications Act, as amended, 47 U.S.C. § 155(c)(1), and Section 0.201(d) of the Commission's rules, 47 C.F.R. § 0.201(d), THAT AUTHORITY IS DELEGATED to the Chief, Common Carrier Bureau to resolve those issues necessary for the assignment of the 888 set-aside vanity numbers and

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<sup>78</sup> ResponseTrak® Call Centers, a division of New England 800 Company ("Responsetrak"), filed a written Ex Parte presentation on February 24, 1998. Responsetrak proposed that toll free subscribers be divided into two categories of users: Enterprise and Communicator. An Enterprise user would use its codes for commercial, business, or philanthropic uses, provided it meets certain conditions, including that its number be published in "all available" public directory listings. A Communicator user would use its codes for personal, residential, pager, or business uses that don't meet the conditions set for an enterprise use. In addition, Responsetrak and ICB filed a joint written Ex Parte letter on March 13, 1998 requesting that deployment of 877 be delayed until the Commission has resolved the issue of vanity-number treatment. The Office of Advocacy, U.S. Small Business Administration ("SBA") filed a written Ex Parte Presentation on March 17, 1998 requesting a delay in the opening of the 877 toll free code until the Commission has resolved the issue of vanity-number treatment and has analyzed alternatives that can ease the burden on small entities. USBA raised concerns over conflicts of interests involving RespOrgs.

Responsetrak's proposal to partition toll free service was rejected in the Second Report and Order in this docket and no party sought reconsideration of that decision. See Second Report and Order at paras. 64-67. As vanity number assignment is addressed in this Fourth Report and Order, the request for delaying opening 877 is moot. In addition, this Fourth Report and Order considers the effects on small businesses. Furthermore, delaying 877 deployment would have adverse consequences on new small RespOrgs planning their businesses around the April 5, 1998 date. The issue of whether it is a conflict of interest for toll free service providers to operate as RespOrgs is outside the scope of this proceeding, and will be addressed in part in response to petitions for reconsideration to the Second Report and Order in this docket.

implementation of 877, including conservation plans, if needed on any or all toll free codes in use to prevent exhaust of toll free numbers before deployment of the next toll free code.

45. IT IS FURTHER ORDERED that, pursuant to section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by American Telegram Corporation IS DENIED.

46. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this FOURTH REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

**Appendix A**

**Final Rules**

**PART 52 - NUMBERING**

**§ 52.111 Toll Free Number Assignment**

Toll free numbers shall be made available on a first-come, first-served basis unless otherwise directed by the Commission.

## Appendix B

### FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act ("RFA"),<sup>1</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Toll Free Service Access Codes*, Notice of Proposed Rulemaking ("Notice").<sup>2</sup> The Commission sought written public comment on the proposals in the Notice, including comments on the IRFA.<sup>3</sup> This present Final Regulatory Flexibility Analysis ("FRFA") in this Fourth Report and Order ("Order") conforms to the RFA.<sup>4</sup>

2. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our statements made in preceding sections of this Fourth Report and Order, the statements set forth in those preceding sections shall be controlling.

#### **Need for, and Objectives of, the Order:**

3. The Commission, pursuant Sections 1, 4(i), 201-205, 218, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 218, and 251, adopts this Fourth Report and Order to ensure the efficient, fair, and orderly allocation of toll free numbers.

#### **Summary of Significant Issues Raised by the Public Comments in Response to the IRFA:**

4. In the Notice, the Commission included an IRFA of the possible impact on small entities of the proposals suggested in the Notice.<sup>5</sup> The Commission noted that the proposals set forth in the Notice may have a significant economic impact on a substantial number of small entities, because toll free numbers are essential to many businesses both in terms of marketing and advertising products. Further, the Commission noted that toll free numbers may also have an intrinsic value to many businesses. The Commission sought

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>2</sup> *Toll Free Service Access Codes*, Notice of Proposed Rulemaking, 10 FCC Rcd 13692, 13707 (1995) ("Notice").

<sup>3</sup> Notice at para. 61.

<sup>4</sup> See 5 U.S.C. § 604.

<sup>5</sup> Notice, Appendix A.

written public comments on the IRFA.<sup>6</sup> Although no comments were submitted in direct response to the IRFA, the Commission has addressed the issues raised in the general comments that pertain to small entities,<sup>7</sup> and has considered the possible economic impact on small entities.

**Description and Estimate of the Number of Small Entities to which the Rules Will Apply:**

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>8</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>9</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>10</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").<sup>11</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>12</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>13</sup> "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>14</sup> As of 1992, there were approximately 85,006 such jurisdictions in the United States.<sup>15</sup> This number includes 38,978 counties, cities,

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<sup>6</sup> Notice at para. 61.

<sup>7</sup> See, e.g., MFS Communications Co., Inc. ("MFS") Comments at 4-5.

<sup>8</sup> 5 U.S.C. § 603(b)(3).

<sup>9</sup> *Id.* § 601(6).

<sup>10</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

<sup>11</sup> Small Business Act, 15 U.S.C. § 632 (1996).

<sup>12</sup> 5 U.S.C. § 601(4).

<sup>13</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>14</sup> 5 U.S.C. § 601(5).

<sup>15</sup> U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.<sup>16</sup> The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. Below, we further describe and estimate the number of small entity licensees and regulates that may be affected by the proposed rules, if adopted.

6. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service ("TRS").<sup>17</sup> According to data in the most recent report, there are 3,459 interstate carriers.<sup>18</sup> These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

7. The SBA has defined establishments engaged in providing "Radiotelephone Communications" and "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.<sup>19</sup> Below, we discuss the total estimated number of telephone companies falling within the two categories and the number of small businesses in each, and we then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

8. Although some affected incumbent local exchange carriers ("ILECs") may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately

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<sup>16</sup> *Id.*

<sup>17</sup> FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier)* (Nov. 1997) (*Telecommunications Industry Revenue*).

<sup>18</sup> *Id.*

<sup>19</sup> 13 CFR § 121.201, Standard Industrial Classification (SIC) codes 4812 and 4813. See also Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by the SBA as "small business concerns."<sup>20</sup>

## 1. Responsible Organizations

9. This Order applies to all Responsible Organizations ("RespOrgs"), which may be small business entities. Any entity that meets certain eligibility criteria may serve as a RespOrg. Neither the Commission nor the SBA has developed a definition of small entities that would apply specifically to RespOrgs. The most reliable source of information regarding the number of RespOrgs appears to be data collected by Database Service Management, Inc. ("DSMI"), the organization that administers the toll free allotment database. According to a May 8, 1996, report obtained from DSMI, 168 companies reported that they were RespOrgs.<sup>21</sup> Although it seems certain that some of these RespOrgs are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of RespOrgs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 168 small entity RespOrgs that may be affected by the decisions adopted in this Fourth Report and Order.

## 2. Toll Free Subscribers

10. This Order also applies to all toll free subscribers, which also may be small business entities. "As noted and discussed *supra*, the RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." We note here that toll free subscribers may include entities from all three of these categories of small entities." Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to toll free subscribers. The most reliable source of information regarding the number of 800 subscribers of which we are aware appears to be the data we collect on the 800 numbers in use.<sup>22</sup> According to our most recent data, at the end of 1995, the number of 800 numbers in use was 6,987,063. Similarly, the most reliable source of information regarding the number of 888 subscribers appears to be the data we collect on the 888 numbers in use.<sup>23</sup> According to our most recent data, as of

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<sup>20</sup> See 13 CFR § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such ILECs.

<sup>21</sup> DSMI, *SMS/800 Overview, SMS/800 Statistics* (May 8, 1996).

<sup>22</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *FCC Releases, Study on Telephone Trends*, Tbl. 20 (May 16, 1996).

<sup>23</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Long Distance Carrier Code Assignments*, p. 80, Tbl. 10B (Oct. 18, 1996).